STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **BRETT FINKELSTEIN**	:	DETERMINATION DTA NO. 816783
For Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 1992 through February 28, 1993.	:	

Petitioner, Brett Finkelstein, 7945 Shelby Circle, Boca Raton, Florida 33496-1324, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1992 through February 28, 1993.

On June 9, 1999 and July 2, 1999, respectively, petitioner, appearing by Rivkin, Radler & Kremer, Esqs. (Scott Eisenmesser, Esq., of counsel), and the Division of Taxation by Barbara G. Billet, Esq. (Christina L. Siefert, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based upon documents and briefs to be submitted by November 24, 1999, which date commenced the six-month period for issuance of this determination (Tax Law § 2010[3]). After due consideration of the evidence and arguments submitted, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner timely filed either a request for a conciliation conference or a petition with the Division of Tax Appeals contesting certain statutory notices of determination.

FINDINGS OF FACT

1. At issue in this matter are three notices of determination and one notice of estimated determination issued by the Division of Taxation ("Division") against petitioner, Brett Finkelstein. These notices assess sales and use taxes due for the four sales tax quarterly periods ended May 31, 1992, August 31, 1992, November 30, 1992 and February 28, 1993, as follows:

Assessment ID #	Sales Tax Quarterly Period Ended	Tax Amount
L-007970408-4	May 31, 1992	$44,572.00
L-007970410-3	August 31, 1992	$61,284.00
L-007970409-3	November 30, 1992	$ 1,000.00
L-007970407-5	February 28, 1993	$40,307.00

Each of the notices is dated September 27, 1993, and each claims petitioner was an officer and person responsible to collect and remit sales and use taxes on behalf of GF N.Y.C., Inc., pursuant to Tax Law § 1138(a); § 1131(1) and § 1133(a). The dollar amounts shown above are exclusive of penalty and interest which were also assessed as due under each of the notices. Finally, the notice for the period ended November 30, 1992 is a notice of estimated determination (as opposed to a notice of determination).

2. The notices described above were addressed to petitioner, Brett Finkelstein, at 134 The Knoll, Syosset, New York 11791-4310. This same address is listed on the Division's mailing records as the address to which the notices were mailed.

3. Petitioner protested the liability assessed under the foregoing notices by filing a request for a conciliation conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). This request is signed as dated July 1, 1998, the envelope in which it was mailed bears a United States Postal Service ("USPS") postmark of July 1, 1998, and the request and

envelope each bear a July 6, 1998 BCMS receipt stamp. Since this filing date was more than 90 days after the September 27, 1993 mailing date on the face of the notices, petitioner's request for a conciliation conference was denied as untimely per a BCMS conciliation order (CMS No. 169377) dated August 7, 1998.

4. Petitioner protested this denial by filing a petition with the Division of Tax Appeals. Petitioner alleged, in his request for conciliation conference and petition, that the notices were not issued to his last known address and that he never received the notices. More specifically, petitioner maintained that the notices should have been mailed to him at the address listed for him on a Certificate of Registration filed by GF N.Y.C., Inc., to wit, 134 The Chase, Syosset, New York 11791. Petitioner alleges that he learned of the assessments via a warrant filed against him, and that he responded by filing the request for conciliation conference described above.[1]

5. The Division filed an answer to the petition alleging that petitioner's conference request was not filed within 90 days after the date of issuance of the notices and was properly denied as untimely, and that therefore the notices should be sustained.

6. Attached to petitioner's brief is a copy of a one-page document identified by petitioner as a Certificate of Registration (***see*** 20 NYCRR 539.2) for GF N.Y.C., Inc. This document is signed as dated May 26, 1992 and bears a stamped receipt date of May 29, 1992. This certificate lists 270-11th Avenue, New York, New York 10011 as the address of the principal place of business for GF N.Y.C., Inc. Petitioner, under the title vice-president, is included among the three individuals listed for GF N.Y.C., Inc. on this certificate. His address is listed on this document as 134 The Chase, Syosset, New York 11791. Petitioner asserts that this address

[1] Attached to the petition is a one page document entitled "Judgments," listing an entry for a judgment docketed and perfected in May 1994 in favor of the Division against petitioner. Petitioner's address is listed on this document as 134 The Knoll, Syosset, New York 11791-4310.

should have been used on the notices at issue rather than the 134 The Knoll, Syosset, New York 11791-4310 address which was in fact used. Petitioner maintains that the address used (i.e., 134 The Knoll) was taken from his income tax filings, that such address was not his last known address for sales tax purposes, and that the notices at issue were therefore not properly mailed in accordance with Tax Law § 1147(a)(1).

7. In support of its position that the address used was correct and that the notices were properly mailed, the Division submitted evidence describing its mailing procedures. Notices of determination and notices of estimated determination, such as those at issue herein, are computer-generated by the Division's Computerized Case and Resource Tracking System ("CARTS") Control Unit. The computer preparation of such notices also includes the preparation of a computer printout entitled "Assessments Receivable, Certified Record for Zip + 4 Minimum Discount Mail," known commonly as a certified mailing record ("CMR"). The CMR lists those taxpayers to whom notices of determination are being mailed and also includes, for each such notice, a separate certified control number. The pages of the CMR remain connected to each other before and after acceptance of the notices by the USPS through return of the CMR to the CARTS Control Unit. Each computer-generated notice of determination is pre-dated with its anticipated mailing date, and each is assigned a certified control number. This number is recorded on the CMR under the heading "Certified No." The CMR bears the date of its printing in its upper left hand corner which is approximately 10 days earlier than the anticipated mailing date for the notices. This period is provided to allow sufficient time for manual review and processing of the notices, including affixation of postage and mailing. The printing date on the CMR is manually changed at the time of mailing by Division personnel to

conform to the actual date of mailing of the notices. In this case, page one of the CMR shows a print date of September 17, 1993, which has been manually changed to September 27, 1993.

8. After a notice of determination is placed in the Division's Mail Processing Center ("mailroom") "Outgoing Certified Mail" basket, a staffer operates a machine which places each statutory notice in an envelope, weighs and seals each envelope and affixes postage and fee amounts thereon. A mailroom clerk then checks the first and last pieces of mail and verifies the names and certified mail numbers against the information contained on the CMR. The clerk then performs a random review of 30 or fewer pieces of certified mail listed on the CMR by checking the envelopes against the information from the CMR. Thereafter, a mailroom employee delivers the stamped envelopes and the associated CMR to one of the various branches of the USPS in Albany, New York, where a postal employee accepts the envelopes into the custody of the Postal Service, affixes a dated postmark or his or her signature or initials to the CMR, and either circles the total number of pieces of mail received or indicates such number of pieces by writing the same on the CMR.

9. In the ordinary course of business a mailroom employee picks up the CMR from the post office on the following day and returns it to the originating office (CARTS Control) within the Division.

10. The CMR relevant to this case is a 25-page computer-generated document entitled "Certified Record for Zip + 4 Minimum Discount Mail." This CMR lists consecutive certified control numbers P 911 003 415 through P 911 003 682, inclusive. Each such certified control number is assigned to an item of mail listed on the 25 pages of the CMR. Specifically, corresponding to each listed certified control number is a notice number, the name and address of the addressee, and postage and fee amounts. The CMR herein lists 11 items of mail on each of

its pages except its final page, which lists 4 items, for a total of 268 items of mail corresponding to the 268 certified control numbers listed thereon, and there are no deletions from the list.

11. Information regarding the notices of determination at issue is contained on page 21 of the CMR. Specifically, corresponding to the consecutive certified control numbers P 911 003 640 through P 911 003 643 are the consecutive notice numbers L-007970407 through L-007970410, respectively, along with information listing petitioner's name and the address 134 The Knoll, Syosset, New York 11791-4310. This information, including the address, is identical to that listed on the subject notices of determination. [2]

12. Each page of the CMR bears the postmark of the Roessleville Branch of the USPS, dated September 27, 1993.

13. The last page of the CMR, page 25, also indicates "total pieces" listed thereon of 268. This figure has been manually circled and beneath it is the signature or initials of a Postal Service employee.

14. The affixation of the Postal Service postmark, the signature or initials of the Postal Service employee, and the circling of the "total pieces" listed figure indicate that all 268 pieces listed on the CMR were received at the post office.

15. The Division generally does not request, demand, or retain return receipts from certified or registered mail.

16. The facts set forth above in Findings of Fact "7" through "9", "14" and "15" were established through affidavits made by Geraldine Mahon and James Baisley. Ms. Mahon is employed as the Principal Clerk in the Division's CARTS Control Unit. Ms. Mahon's duties

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[2] The notice numbers, names and addresses of taxpayers other than petitioner have been redacted from the CMR for purposes of compliance with statutory privacy requirements.

include supervising the processing of notices of determination such as those at issue herein. Mr. Baisley is employed as a Principal Mail and Supply Clerk in the Division's Mail Processing Center. Mr. Baisley's duties include supervising mailroom staff in delivering outgoing mail to branch offices of the USPS.

17. The fact that the Postal Service employee circled the total number of pieces listed on the CMR to indicate that this was the number of pieces received was established through the affidavit of Mr. Baisley. Mr. Baisley's knowledge of this fact is based on his knowledge that the Division's Mail Processing Center specifically requested that Postal Service employees either circle the number of pieces received or indicate the total number of pieces received by manually writing the number of such pieces on the CMR.

18. Review of the notices in this case reveals that the certified numbers P 911 003 640 through P 911 003 643 appear in the upper center section of the faces of the notices in a manner consistent with the information on the CMR.

19. In addition to the foregoing, the Division also submitted three affidavits made by Leonard Finke, the director of the Division's Personal Income Tax Processing Bureau. His duties include overseeing analysis and testing of the Division's computer systems which process tax return information, store information derived therefrom, and generate printouts of such information. Each affidavit is identical in content and each includes an attached computer printout listing the address reported by petitioner and captured by the Division's computer system for three different personal income tax documents filed by petitioner for the year 1992, as follows:

Form	Filing Date	Address
IT-370; Application for Automatic Extension of Time to File for Individuals	04/15/93	Brett & Dana Finkelstein 134 The Knoll Syosset, New York 11791-4310
IT-372; Application for Additional Extension of Time to File for Individuals	04/15/93	Brett & Dana Finkelstein 134 The Knoll Syosset, New York 11791-4310
IT-201; Resident Income Tax Return	10/15/93	Brett & Dana Finkelstein 134 The Chase Syosset, New York 11791-4308

CONCLUSIONS OF LAW

A. Tax Law § 1138(a)(1) authorizes the Division to issue a Notice of Determination to a taxpayer if a return required under Article 28 is not filed or if a return required under Article 28, when filed, is incorrect or insufficient. Section 1138(a)(1), in conjunction with Tax Law § 1131(1) and § 1133(a), provides for the issuance of notices of determination to persons required to collect and remit sales and use taxes on behalf of various entities, as well as for the issuance of notices to the taxpayer entity itself. Pursuant to Tax Law § 1138(a)(1), as in effect during the period in issue, such a determination "shall finally and irrevocably fix the tax" unless the person against whom it is assessed files a petition with the Division of Tax Appeals seeking revision of the determination within 90 days of the mailing of the notice. Alternatively, Tax Law § 170(3-a)(a) allows the taxpayer to file a request for a conciliation conference with the Division's BCMS following the issuance of a Notice of Determination so long as the time to petition for a hearing in respect of such notice has not elapsed. Pursuant to these provisions, then, petitioner had 90

days from the issuance of the subject notices to file a request for a conciliation conference with BCMS or a petition with the Division of Tax Appeals. [3]

B. Tax Law § 1147(a)(1) provides as follows:

> Any notice authorized or required under the provisions of this article may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this article or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable. The notice of determination shall be mailed promptly by registered or certified mail. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this article by the giving of notice shall commence to run from the date of mailing of such notice.

C. Where, as here, the Division claims a taxpayer's protest against a notice was not timely filed, the initial inquiry must focus on the issuance (i.e., mailing) of the notice. Where a notice is found to have been properly mailed, "a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail" (***see, Matter of Katz***, Tax Appeals Tribunal, November 14, 1991). However, the "presumption of delivery" does not arise unless or until sufficient evidence of mailing has been produced, and the burden of demonstrating proper mailing rests with the Division (***id.***). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (***see, Matter of Accardo***, Tax Appeals Tribunal, August 12, 1993).

D. The mailing evidence required is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of notices of determination by one with

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[3] Section 1138(a)(1), as amended by Laws of 1996 (ch 267), deleted the language in the former statutory provision which finally and irrevocably fixed sales tax determined due. This amendment was effective July 2, 1996, but was made applicable to taxable years commencing on and after January 1, 1997 as specified in section 3 of Laws of 1996 (ch 267). Consequently, the amendment may not be given retroactive effect (***see*** McKinney's Cons Law of NY, Book 1, Statutes §51[b]). Since the assessments in this case pertain to the time period March 1, 1992 through February 28, 1993, the amendment to Tax Law § 1138(a)(1) does not apply.

knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in this particular instance (***see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv.***, Tax Appeals Tribunal, May 23, 1991).

E. In this case, the Division introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Mahon and Mr. Baisley, two Division employees involved in and possessing knowledge of the process of generating and issuing (mailing) notices of determination (***see***, Finding of Fact "16").

F. The Division also presented sufficient documentary proof, i.e., the CMR, to establish that the notices of determination at issue were mailed to petitioner on September 27, 1993. Specifically, this 25-page document lists sequentially numbered certified control numbers with corresponding names and addresses. No entries on this document have been deleted. All 25 pages of the CMR bear a USPS postmark dated September 27, 1993. Additionally, as part of the standard procedure for the issuance of notices of determination, a postal employee circled the total pieces listed figure and signed or initialed page 25 of the CMR to indicate receipt by the post office of all pieces of mail listed thereon (***cf., Matter of Roland***, Tax Appeals Tribunal, February 22, 1996 [where the mailing documents were found to be inadequate because there was no showing of the source of the affiant's knowledge as to the significance of the circling of the number of total pieces of mail listed]). This evidence is thus sufficient to establish that the Division mailed the subject notices of determination on the date claimed. Accordingly, the only remaining question is whether the address used on the notices was the correct address such that the mailing was a proper mailing entitled to the presumption of delivery to the addressee in the regular course of the mail. Once such presumption of delivery arises, the same may not as a matter of law be rebutted by the bare assertion of nonreceipt by the addressee (***T.J. Gulf v. New***

York State Tax Commn., 124 AD2d 314, 508 NYS2d 97, 98-99). As noted earlier, however, without proper mailing the presumption of delivery does not arise.

G. Petitioner does not dispute the fact or date of mailing of the notices. However, he maintains that the notices should have been mailed to his last known address for sales tax purposes, and that using his address as set forth on income tax filings (extension requests) was erroneous, apparently notwithstanding that such income tax filings were made during the same time period as the issuance of the notices in question. In short, petitioner claims that the notices should have been mailed to him at 134 The Chase, and not to him at 134 The Knoll.

H. In ***Matter of Nelloquet*** (Tax Appeals Tribunal, March 14, 1996) the Tribunal concluded that notices of determination issued to persons allegedly liable to collect and remit sales and use taxes on behalf of a corporation are to be mailed to the address of the person against whom the Division seeks to assert personal liability and not, at least in the first instance, to the address of the business on whose behalf the person is allegedly required to act. Here, the Division mailed its notices to petitioner's personal address and not to the address listed for the corporation GF N.Y.C., Inc., and thus complied with the direct holding in ***Nelloquet***. The remaining narrow question is whether the Division used the correct personal address for petitioner.

I. It is true that the Division did not mail the notices to petitioner's address as listed on the Certificate of Registration for GF N.Y.C., Inc., but rather mailed the notices to petitioner's address as listed on the described income tax filing date extension applications. Petitioner claims that the Division's mailing was thus not a proper mailing to his last known address *for sales tax purposes*. Petitioner allows that ***Nelloquet*** appears to support the Division's position. However, petitioner would distinguish the case on his assertion that the individuals in ***Nelloquet*** had filed

no documentation under Articles 28 and 29 from which their addresses could be taken whereas petitioner (and his address) was listed on the Certificate of Registration filed by G F N.Y.C., Inc.

J. Petitioner's attempt to distinguish ***Nelloquet*** is rejected. First, the decision in ***Nelloquet*** does not specify whether or not the corporate entity (Nelloquet Restaurant, Inc.) or the individuals involved had filed any documentation under Articles 28 and 29 listing the personal addresses of the individuals. Hence, it is not known whether such individuals and their personal addresses were, as here, listed on a Certificate of Registration or other such document. Moreover, it remains that petitioner here did not file any document, including any tax return, or make any application, under Articles 28 and 29. That is, G F N.Y.C., Inc. made the filing in this instance (the Certificate of Registration) and listed petitioner thereon together with what was (presumably), at the time of such filing, his personal address.

Under these circumstances, the Division's use of petitioner's address as shown on income tax filings made immediately prior to the issuance date of the notices in question is consistent with the general mandate that notices are to be mailed to the last known address of the *person* for whom the notice is intended. Using petitioner's address as last known to the Division, albeit taken from income tax filings, is entirely consistent with the holding in ***Nelloquet***, where the Tribunal went to great lengths in distinguishing the liability of the allegedly responsible person as separate and independent from that of the underlying entity, noting in this context that it is the entity (but not the person allegedly responsible) which files the return required under Article 28 (***see, Matter of Nelloquet, supra.)*** It is also noteworthy that there is no requirement for persons potentially liable to collect and remit sales and use taxes on behalf of an entity, per Tax Law §§ 1131(1) and 1133(a), to list their current personal addresses on the entity's sales tax returns when filed or otherwise periodically update their own addresses for sales tax purposes. As the Tribunal observed in ***Nelloquet***, "the Division must use its best efforts to obtain the address of the 'person'

against whom it seeks to assert liability," and "[w]here . . . the Division has in its own records the address of [the person], it seems clear that such address is 'obtainable' in the context of section 1147(a)(1)." In fact, if the Division had mailed the notices to the address listed in the Certificate of Registration, i.e., 134 The Chase instead of 134 The Knoll, petitioner would be in a position to claim that the Division's mailing was improper as not made to his last known address at the time of mailing.[4]

K. Section 657(a) of the Tax Law provides the Commissioner of Taxation with authority to extend the due date for filing a personal income tax return for a period not to exceed, in the aggregate, six months. The Forms IT-370 and Form IT-372, by which petitioner secured extensions of the due date for his 1992 personal income tax return, were obviously filed prior to the filing of petitioner's 1992 personal income tax return and served, ultimately, to extend the due date for such return to October 16, 1993. Specifically, Form IT-370, due for filing on or before April 15, 1993, extended the due date for petitioner's 1992 income tax return for a period of four months, to wit, until August 16, 1993 (20 NYCRR 157.2). In turn, Form IT-372, due for filing on or before August 16, 1993 (i.e., before expiration of the IT-370 period) further extended the due date by two more months, to wit, until October 16, 1993 (20 NYCRR 157.3). Review of the information captured by the Division from these forms reveals that petitioner's address was listed on both as 134 The Knoll, Syosset, New York 11791-4310. This is the address to which the sales tax notices at issue were mailed on September 27, 1993, which date falls *after* both of such extension request forms were filed but *before* the October 15, 1993 date on which petitioner's income tax return was filed (see Finding of Fact "19"). In contrast, petitioner's 1992

[4] The record includes no evidence or explanation as to the difference between 134 The Chase and 134 The Knoll, other than the obvious name difference and the fact that the final four zip code digits differ (134 The Chase is 11791-4308 whereas 134 The Knoll is 11791-4310; ***see*** Finding of Fact "19"). Similarly, there is no evidence or explanation as to why petitioner listed his address as 134 The Chase on the May 1992 Certificate of Registration, then listed his address as 134 The Knoll on the two extension request forms, and then ultimately listed his address as 134 The Chase on his 1992 personal income tax return.

tax return as filed changes petitioner's address from 134 The Knoll back to 134 The Chase, Syosset, New York 11791-4308, which was the address listed on the sales tax Certificate of Registration filed in May 1992. From all of this information, it becomes clear that according to the Division's records, the last known address of the "person" (petitioner) for whom the notices were intended was, at the September 27, 1993 time of issuance of the notices, 134 The Knoll, Syosset, New York 11791-4310, and thus the notices were properly issued.

L. Given the foregoing, it is concluded that the Division properly mailed the notices in question in accordance with Tax Law § 1147(a)(1), thus giving rise to a presumption of delivery of the notices. Petitioner's general denial of personal receipt of the notices is insufficient, as a matter of law, to overcome the presumption of receipt (***T.J. Gulf v. New York State Tax Commn***, ***supra***; ***Matter of American Cars-R-Us, Inc. v. State Tax Commn***, 147 AD2d 795, 537 NYS2d 672). The record includes no evidence of nondelivery, misdelivery or return of the certified mail items at issue. In sum, with proper mailing established, no rebuttal of the presumption of delivery, and no timely protest against the notices, it follows that there is no jurisdiction to address the merits of petitioner's case (***Matter of Roland, supra***).

M. The petition of Brett Finkelstein is hereby dismissed.

DATED: Troy, New York
May 4, 2000

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE